In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 948

BOOKER T. DUKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on November 15, 1966 (Pet. App. 1a-2a). A petition for rehearing was denied on December 7, 1966 (Pet. App. 10a). The petition for a writ of certiorari, filed on January 9, 1967, is out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no occasion for further review.

Petitioner was convicted of possessing unlawfully imported narcotics, in violation of 21 U.S.C. 174, and sentenced to five years' imprisonment. The evidence showed that at approximately 10:10 a.m. on October

15, 1964, an informer, Emanuel Sims, told Richard Jones of the Indianapolis Police that petitioner and one Richard Allen had gone to Chicago to obtain a quantity of narcotics (G. 6).[1] Sims, who had been a reliable informer associated with Jones for the past nine years (G. 9, 14, 32), explained that he had been with petitioner and Allen at approximately 3:00 a.m. that morning, and that they told him of their plans (G. 9, 13).[2] Sims also told Jones that petitioner and Allen would be returning to Indianapolis in a short while and gave a detailed description of the automobile which they would be driving (G. 9). Jones had previously kept petitioner's pool room under observation because known addicts frequented the place (G. 8-9).

At approximately 3:00 p.m., as predicted, petitioner was observed in the car described by Sims driving towards Indianapolis (G. 11). The police halted petitioner's car and ordered both its occupants to step out. A search of the car revealed a package of heroin under the seat which petitioner had occupied (G. 11, 15, 20).

During the ride to police headquarters, petitioner stated to an accompanying officer, "You have got me tight. What can I do to help myself." The officer

---

[1] "G." refers to the government's appendix; "Tr." refers to the original transcript of trial, and "H" refers to hearing on motion for new trial, which we are lodging with the Clerk of this Court.

[2] Richard Allen, who was previously convicted, testified that he told Sims that they were going to Chicago to obtain heroin (Tr. 170).

replied, "You don't have to talk to me at all" (Tr. 85; G. 4, 12). Upon arrival at headquarters, petitioner was advised of his right to remain silent and to have the assistance of counsel. Petitioner replied that he did not want counsel at that time, but that he would get one the following morning (G. 4, 7, 12, 15, 16, 17). He then repeated that he wished to "help himself" and again was informed that he need not say anything (G. 4-5). Petitioner then told the local police authorities that, when apprehended, he was returning from his fifth trip to Chicago to purchase heroin and that he had purchased $1500 worth of heroin from one William Anderson that morning in Chicago (G. 5).

The following morning, petitioner was released into the custody of federal agent Rankin for possible federal prosecution (G. 18). After he was advised of his right to counsel and to remain silent, petitioner again stated that he did not want a lawyer and related the circumstances of his trip to Chicago (G. 18-19).

1. Upon conclusion of the government's case, petitioner moved to strike all testimony and evidence relating to the narcotics found in his car, and the statements subsequently made by him, on the ground that the arrest was not founded upon probable cause. The motion was properly denied. The informant Sims had long been known to officer Jones, and the officer had found him reliable. The officer made a careful inquiry into the manner in which Sims had acquired the information pertaining to petitioner's trip to Chi-

cago. Moreover, the detailed description of the car and its occupants given by Sims was fully corroborated by observation. As in *Draper* v. *United States*, 358 U.S. 307, 313, the arresting officers "had personally verified every facet of the information given * * * by [the informer] except whether petitioner had accomplished his mission * * *." In these circumstances, the officers clearly had probable cause to arrest petitioner. *Draper* v. *United States*, *supra*; *Costello* v. *United States*, 324 F.2d 260 (C.A. 9), certiorari denied, 376 U.S. 930.

That Sims later, on a motion for a new trial, denied that he had supplied information to Jones is of no moment. In light of the circumstances shown at that hearing,[3] the trial court could properly discredit his testimony and adhere to the finding that there was probable cause supporting the arrest. *United States* v. *Campos*, 255 F. Supp. 853 (S.D.N.Y.), affirmed, 362 F. 2d 1011 (C.A. 2), certiorari denied, 385 U.S. 842.

2. The trial court properly admitted testimony relating the incriminating statements made by petitioner after his arrest. Petitioner's trial was commenced prior to June 13, 1966, and was thus not governed by the principles laid down in *Miranda* v. *Ari-*

---

[3] In support of a motion for a new trial, petitioner submitted an affidavit signed by the informer, Sims, attesting that he had never given any information to officer Jones. At a hearing on this motion, Sims testified to the same effect (H. 23-24). However, other evidence showed that Sims received twenty dollars from petitioner upon signing the affidavit (H. 25) and that Sims had been threatened by petitioner and was afraid of him (G. 27, 30, 31).

zona, 384 U.S. 436. See *Johnson* v. *New Jersey*, 384 U.S. 719.

The one statement which petitioner made prior to being advised of his right to counsel and to remain silent—*i.e.*, "You have got me tight. What can I do to help myself?" (Tr. 85; G. 4, 12)—was a spontaneous, unsolicited remark. The remainder of petitioner's statements were made after he was fully advised of his constitutional rights. Petitioner did not request the assistance of counsel, but in fact declined offers of such assistance. Accordingly, petitioner's voluntary statements were not taken in violation of the principles established by *Escobedo* v. *Illinois*, 378 U.S. 478.

3. Petitioner's contention that he was denied the right of confrontation under the Sixth Amendment because the informer was not produced at trial comes too late, having been raised for the first time in his petition for rehearing in the court of appeals. See *Rugendorf* v. *United States*, 376 U.S. 528, 534. It is, in any event, without merit. The government had no duty to produce the informer, whose identity was revealed to the defense and whose whereabouts were unknown.[4] See *United States* v. *Cimino*, 321 F. 2d 509, 512 (C.A. 2); *Williams* v. *United States*, 273 F. 2d 781, 795-796 (C.A. 9), certiorari denied, 362 U.S. 951. And petitioner was not prejudiced by the informer's absence. Indeed, the defense sought to

---

[4] At the time of trial, a warrant had been issued for Sims' arrest on an unrelated matter, and there was evidence that the police did not then know where he could be found (Tr. 55-56, 69-70).

capitalize on Sims' absence at trial as part of its argument that he was "unreliable" (Tr. 69-70, 156-157). Moreover, Sims ultimately did appear (at the hearing on petitioner's new-trial motion) and testified before the court on the only issue as to which his testimony was sought by the defense—that of probable cause. Thus, assuming *arguendo* that petitioner had a right to have the testimony of the informer with regard to the legality of his arrest—an issue to be decided by the court alone (9 Wigmore, *Evidence* § 2550)—that testimony was properly presented here.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

FEBRUARY 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 245131 585